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7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE DISTRICT OF ARIZONA

9 Lora Pope, an unmarried woman, ) No. CV 17-394-TUC-LAB  
10 Plaintiff, ) **ORDER**  
11 vs. )  
12 Commissioner of Social Security )  
13 Administration, )  
14 Defendant. )  
15 \_\_\_\_\_ )

16 The plaintiff filed this action for review of the final decision of the Commissioner for  
17 Social Security pursuant to 42 U.S.C. § 405(g). (Doc. 1, p. 1)

18 The Magistrate Judge presides over this case pursuant to 28 U.S.C. § 636(c) having  
19 received the written consent of both parties. *See* FED.R.CIV.P. 73; (Doc. 14)

20 The court finds that the ALJ failed to “fully and fairly develop the record.” *Tonapetyan*  
21 *v. Halter*, 242 F.3d 1144, 1150 (9<sup>th</sup> Cir. 2001). The case is remanded for further proceedings.

22  
23 PROCEDURAL HISTORY

24 In January of 2014, Pope filed applications for disability insurance benefits and for  
25 supplemental security income pursuant to Title II and Title XVI of the Social Security Act  
26 respectively. (Tr. 180, 186) She alleged disability beginning on August 1, 2012, due to  
27 “fibromyalgia, diabetes, obesity, bad back and hips.” (Tr. 180, 186, 202)  
28

1 Her applications were denied initially and upon reconsideration. (Tr. 113-120); (Tr.  
2 123-129) Pope requested review and appeared with counsel at a hearing before Administrative  
3 Law Judge (ALJ) Laura Speck Havens on June 8, 2016. (Tr. 43) In her decision, dated October  
4 6, 2016, the ALJ found Pope was not disabled because there are jobs in the national economy  
5 that she can perform considering her age, education, work experience, and residual functional  
6 capacity. (Tr. 26-35)

7 Pope appealed and submitted additional records from her treating physician, “Sagir Bera,  
8 M.D.” (Tr. 2) On June 3, 2014, the Appeals Council rejected the additional evidence and  
9 denied review making the decision of the ALJ the final decision of the Commissioner. (Tr. 1-6)  
10 Pope subsequently filed this action appealing that final decision. (Doc. 1)

#### 11 12 Claimant’s Work History and Medical History

13 Pope was born in September of 1968. (Tr. 33) She was 48 years old when ALJ Havens  
14 issued her decision in October of 2016. (Tr. 35)

15 Pope has a high school diploma. (Tr. 47) She worked as a bartender until August of  
16 2014 when she was “let go” because she could no longer stand for longer than 15-20 minutes  
17 at a stretch. (Tr. 47-49) She did not apply for unemployment benefits. (Tr. 47-48)

#### 18 19 *Physical Impairment*

20 In April of 2014, Martha A. Goodrich, M.D., reviewed the medical records for the  
21 disability determination service and offered an opinion of Pope’s physical limitations. (Tr. 68)  
22 Goodrich opined that Pope could lift 10 pounds occasionally and 10 pounds frequently. (Tr.  
23 71-74); (Tr. 80-83) She could stand and/or walk for 2 hours in an 8-hour day. *Id.* She could  
24 sit for more than 6 hours in an 8-hour day. *Id.* She should never crawl or climb ladders, ropes,  
25 or scaffolds. *Id.* She should only occasionally climb ramps or stairs, stoop, kneel, or crouch.  
26 *Id.* She should avoid concentrated exposure to environmental hazards such as fumes, odors,  
27 dusts, gases, or poor ventilation. *Id.* She should avoid even moderate exposure to hazards  
28 such as machinery or heights. *Id.*

1 In October of 2014, Marilyn Orenstein, M.D., reviewed the medical records for the  
2 disability determination service and offered an opinion of Pope's physical limitations. (Tr. 94-  
3 96); (Tr. 106-108) Orenstein agreed with the limitations previously provided by Goodrich. *Id.*

4 Also in October of 2014, Pope was examined by Jerome Rothbaum, M.D., for the  
5 disability determination services. (Tr. 336) Rothbaum diagnosed morbid obesity, asthma,  
6 nicotine abuse, alcohol abuse, myofascial low back pain, and hypertension. (Tr. 339)  
7 Rothbaum opined that none of these conditions would impose any limitations for 12 consecutive  
8 months. *Id.*

9 The record contains a Physical Residual Function Capacity Statement apparently from  
10 Pope's treating physician, Sagir Bera, D.O. (Tr. 322-323) Bera diagnosed Pope with diabetes,  
11 fibromyalgia, chronic pain syndrome, hyperlipidemia, obstructive sleep apnea, morbid obesity,  
12 and chronic back pain. (Tr. 322) He opined that Pope's pain is severe enough to constantly  
13 interfere with her attention and concentration. (Tr. 322) Bera estimated that Pope could sit for  
14 more than 3 hours at a time, and for about 6 hours in an 8-hour day. (Tr. 323) She could stand  
15 or walk for 10-15 minutes at one time. (Tr. 323) She would need to lie down or recline for  
16 about 3 hours during an 8-hour work day. (Tr. 323) She was "possibly" incapable of working.  
17 (Tr. 322)

18 In July of 2016, Pope was examined by Greg Hunter, M.D., for the disability  
19 determination services. (Tr. 358) He diagnosed Pope with morbid obesity, chronic pain  
20 disorder, diabetes, hypertension, and hypercholesterolemia. (Tr. 367) Hunter opined that Pope  
21 could lift and carry 20 pounds frequently and 50 pounds occasionally. (Tr. 362) She could sit,  
22 stand, or walk for 8 hours without interruption in an 8-hour day. (Tr. 362) She has no  
23 manipulative restrictions. (Tr. 363-364) She should only occasionally climb ladders or  
24 scaffolds or be exposed to unprotected heights. (Tr. 364-365)

25  
26 *Hearing*

27 On June 8, 2016, Pope appeared with counsel at a hearing before ALJ Havens. (Tr. 43)  
28 She testified that she was born in September of 1968. (Tr. 47) She has a high school diploma.

1 (Tr. 47) She worked for many years as a bartender, but she was “let go” in August of 2014  
2 because she could no longer stand for more than 20 minutes at a time. (Tr. 47) She did not file  
3 for unemployment benefits. (Tr. 47-48)

4 Pope testified that she has COPD, migraine headaches, diabetes, obesity, and  
5 fibromyalgia. (Tr. 48) She can dress herself, but someone must watch her bathe because she  
6 might fall. (Tr. 49) She can microwave food and tries to do household chores. (Tr. 49-50) She  
7 does not wash dishes, mop, sweep, or do laundry. (Tr. 50) She will “try to” do grocery  
8 shopping. (Tr. 50) For exercise, she walks to the mailbox and back. (Tr. 51) She takes  
9 lisinopril for high blood pressure, amlodipine for high blood pressure, flexeril for muscle  
10 spasms, and ibuprofen for pain. (Tr. 54, 205)

11 Pope testified that she can sit for up to an hour and a half. (Tr. 55) She can lift ten to  
12 15 pounds. (Tr. 55) She has pain all the time in her lower back, feet and shoulders. (Tr. 55)

13 Susy Miranda testified as a vocational expert. (Tr. 57) Miranda testified that a person  
14 with the limitations described by Goodrich and Orenstein could work as a productions  
15 assembler, general office clerk, or information clerk. (Tr. 59)

#### 17 CLAIM EVALUATION

18 Social Security Administration (SSA) regulations require that disability claims be  
19 evaluated pursuant to a five-step sequential process. 20 C.F.R. §§ 404.1520, 416.920. The first  
20 step requires a determination of whether the claimant is engaged in substantial gainful activity.  
21 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If so, then the claimant is not disabled, and  
22 benefits are denied. *Id.*

23 If the claimant is not engaged in substantial gainful activity, the ALJ proceeds to step  
24 two, which requires a determination of whether the claimant has a severe impairment or  
25 combination of impairments. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). In making a  
26 determination at step two, the ALJ uses medical evidence to consider whether the claimant’s  
27 impairment significantly limits or restricts his or her physical or mental ability to do basic work  
28 activities. *Id.* If the ALJ concludes the impairment is not severe, the claim is denied. *Id.*

1        Upon a finding of severity, the ALJ proceeds to step three, which requires a  
2 determination of whether the impairment meets or equals one of several listed impairments that  
3 the Commissioner acknowledges are so limiting as to preclude substantial gainful activity. 20  
4 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); 20 C.F.R. Pt. 404, Subpt. P, App.1. If the claimant's  
5 impairment meets or equals one of the listed impairments, then the claimant is presumed to be  
6 disabled, and no further inquiry is necessary. *Ramirez v Shalala*, 8 F.3d 1449, 1452 (9<sup>th</sup> Cir.  
7 1993). If the claimant's impairment does not meet or equal a listed impairment, evaluation  
8 proceeds to the next step.

9        The fourth step requires the ALJ to consider whether the claimant has sufficient residual  
10 functional capacity (RFC)<sup>1</sup> to perform past relevant work. 20 C.F.R. §§ 404.1520(a)(4),  
11 416.920(a)(4). If yes, then the claim is denied. *Id.* If the claimant cannot perform any past  
12 relevant work, then the ALJ must move to the fifth step, which requires consideration of the  
13 claimant's RFC to perform other substantial gainful work in the national economy in view of  
14 claimant's age, education, and work experience. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4).

#### 15 16        The ALJ's Findings

17        At step one of the disability analysis, the ALJ found Pope "has not engaged in substantial  
18 gainful activity since August 1, 2012, the alleged onset date. . . ." (Tr. 28) At step two, she  
19 found Pope "has the following severe impairments: obesity, fibromyalgia, diabetes,  
20 hypertension, sleep apnea and chronic obstructive pulmonary disease (COPD) . . . ." (Tr. 28)

21        At step three, the ALJ found Pope's impairments did not meet or equal the criteria for  
22 any impairment found in the Listing of Impairments, Appendix 1, Subpart P, of 20 C.F.R., Part  
23 404. (Tr. 30)

24        The ALJ then analyzed the claimant's residual functional capacity (RFC). She found  
25 "the claimant had the residual functional capacity to perform sedentary work . . . with the  
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27        <sup>1</sup> Residual functional capacity is defined as that which an individual can still do despite  
28 his or her limitations. 20 C.F.R. §§ 404.1545, 416.945.

1 following limitations: The claimant can lift/carry 10 pounds frequently or occasionally. The  
2 claimant can sit for 6 hours and stand/walk for 2 hours, all in an 8-hour workday. Claimant can  
3 never climb ladders/ropes/scaffolds or crawl and can occasionally climb ramps/stairs, balance,  
4 stoop, kneel or crouch. Claimant can have occasional exposure to heights, moving machinery,  
5 dust, fumes and smoke.” (Tr. 30-31) The ALJ gave substantial weight to the opinions of the  
6 non-examining state agency medical consultants. (Tr. 33) The ALJ gave no weight to the  
7 statement apparently authored by Pope’s treating physician, Bera. (Tr. 33)

8 At step four, the ALJ found Pope is unable to perform any past relevant work. (Tr. 33)  
9 At step five, the ALJ found, based on the testimony of the vocational expert, that, considering  
10 her age, education, work experience, and residual functional capacity, Pope can work as a  
11 production assembler, general office clerk, or information clerk. (Tr. 34)

#### 12 13 STANDARD OF REVIEW

14 To qualify for disability benefits the claimant must demonstrate, through medically  
15 acceptable clinical or laboratory standards, an inability to engage in substantial gainful activity  
16 due to a physical or mental impairment that can be expected to last for a continuous period of  
17 at least twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). “An individual shall be  
18 determined to be under a disability only if [her] physical or mental impairment or impairments  
19 are of such severity that [she] is not only unable to do [her] previous work but cannot,  
20 considering [her] age, education, and work experience, engage in any other kind of substantial  
21 gainful work which exists in the national economy, regardless of whether such work exists in  
22 the immediate area in which [she] lives, or whether a specific job vacancy exists for [her] or  
23 whether [she] would be hired if [she] applied for work.” 42 U.S.C. §§ 423(d)(2)(A),  
24 1382c(a)(3)(B).

25 The findings of the Commissioner are meant to be conclusive. 42 U.S.C. §§ 405(g),  
26 1383(c)(3). The decision to deny benefits “should be upheld unless it contains legal error or is  
27 not supported by substantial evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9<sup>th</sup> Cir. 2007).  
28 Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept

1 as adequate to support a conclusion.” *Id.* It is “more than a mere scintilla but less than a  
2 preponderance.” *Id.*

3 “Where evidence is susceptible to more than one rational interpretation, the  
4 [Commissioner’s] decision should be upheld.” *Orn*, 495 F.3d at 630. “However, a reviewing  
5 court must consider the entire record as a whole and may not affirm simply by isolating a  
6 specific quantum of supporting evidence.” *Id.*

7 The Commissioner need not accept the claimant’s subjective testimony of disability, but  
8 if she decides to reject it, she must justify her decision. *Valentine v. Comm’r Soc. Sec. Admin.*,  
9 574 F.3d 685, 693 (9<sup>th</sup> Cir. 2009). “[W]ithout affirmative evidence showing that the claimant  
10 is malingering, the Commissioner’s reasons for rejecting the claimant’s testimony must be clear  
11 and convincing.” *Id.*

12 “If an ALJ finds that a claimant’s testimony relating to the intensity of [her] pain and  
13 other limitations is unreliable, the ALJ must make a credibility determination citing the reasons  
14 why the testimony is unpersuasive.” *Valentine*, 574 F.3d at 693. “The ALJ must specifically  
15 identify what testimony is credible and what testimony undermines the claimant’s complaints.”  
16 *Id.* “In this regard, questions of credibility and resolutions of conflicts in the testimony are  
17 functions solely of the [Commissioner].” *Id.*

#### 18 19 Discussion: Duty to Develop the Record

20 “The ALJ in a social security case has an independent duty to fully and fairly develop  
21 the record and to assure that the claimant’s interests are considered.” *Tonapetyan v. Halter*, 242  
22 F.3d 1144, 1150 (9<sup>th</sup> Cir. 2001) (punctuation modified). “This duty extends to the represented  
23 as well as to the unrepresented claimant.” *Tonapetyan*, 242 F.3d at 1150. The duty is  
24 heightened when the claimant is unrepresented or “may be mentally ill and thus unable to  
25 protect her own interests.” *Id.* “Ambiguous evidence, or the ALJ’s own finding that the record  
26 is inadequate to allow for proper evaluation of the evidence, triggers the ALJ’s duty to conduct  
27 an appropriate inquiry.” *Id.* (punctuation modified) “The ALJ may discharge this duty in  
28 several ways, including: subpoenaing the claimant’s physicians, submitting questions to the

1 claimant's physicians, continuing the hearing, or keeping the record open after the hearing to  
2 allow supplementation of the record." *Tonapetyan*, 242 F.3d at 1150.

3 The claimant here was represented by counsel and does not seem to have a psychological  
4 illness. On the other hand, the court notes that this case was resolved at step five of the  
5 disability analysis, at which point the burden of proof shifts from the claimant to the  
6 Commissioner. *Celaya v. Halter*, 332 F.3d 1177, 1180 (9<sup>th</sup> Cir.2003).

7 In this case, Pope supported her disability claim by submitting a medical source  
8 statement apparently authored by her treating physician, Bera. (Tr. 322-323) Unfortunately,  
9 the statement is incomplete. *Id.* The statement indicates that it is four pages long, but only  
10 pages one and two appear in the record. *Id.* Pages three and four are missing. This error was  
11 recognized by the ALJ who evaluated Bera's statement as follows:

12 The undersigned gives no weight to this statement for several reasons. The  
13 document is incomplete as it is a 4 page document, but only 2 pages were  
14 submitted. The document is unsigned thus it is unclear exactly who provided the  
15 information. Furthermore, a close examination of the treatment records indicate  
16 Dr. Bera treated the claimant only a handful of times, yet opined that the claimant  
17 was "possibly" incapable of working since about 4 years prior. . . . The  
18 undersigned finds that Dr. Bera's opinion is not consistent with the fairly benign  
19 examinations contained in her treatment records.

20 (Tr. 33)

21 The ALJ recognized that the statement was incomplete. (Tr. 33) This irregularity cast  
22 doubt on the provenance of the statement. *Id.* And this doubt made it difficult to determine the  
23 level of deference that should be accorded the document. *Id.* See *Smolen v. Chater*, 80 F.3d  
24 1273, 1285 (9<sup>th</sup> Cir. 1996) ("Because treating physicians are employed to cure and thus have  
25 a greater opportunity to know and observe the patient as an individual, their opinions are  
26 [ordinarily] given greater weight than the opinions of other physicians.").

27 The ALJ further recognized that the statement was ambiguous. (Tr. 33) The form asks  
28 the question, "Was your patient incapable of working after" the date that "your patient's  
impairments, symptoms and limitations [began]?" (Tr. 322) (punctuation modified) In  
response, the author of the statement checked the box, "possibly." *Id.* It is not clear why the  
author equivocated. Was the author unclear about the claimant's limitations, or was the author



1 unclear about what limitations are so profound as to preclude all employment? Perhaps the  
2 author believed that Pope became disabled at some point in time, but did not know when.

3 The ALJ recognized that this statement is “ambiguous” and that “the record is inadequate  
4 to allow for proper evaluation of the evidence.” *See Tonapetyan*, 242 F.3d at 1150.  
5 Accordingly, the ALJ had a duty to fully and fairly develop the record by obtaining the missing  
6 information. The case will be remanded to allow the record to be supplemented and allow the  
7 ALJ an opportunity to reevaluate her decision.

8 The Commissioner argues that even if the record is ambiguous, remand is not required  
9 unless the missing evidence is material citing *Mayes v. Massanari*, 276 F.3d 453, 462 (9<sup>th</sup> Cir.  
10 2001). (Doc. 18, p. 11) In *Mayes*, the court considered when sentence six of 42 U.S.C. §  
11 405(g) requires remand for consideration of new evidence. *Id.* at 461-462. Here, the court  
12 remands, not under sentence six, but because the ALJ failed to fulfil her duty to fully and fairly  
13 develop the record. The Commissioner’s argument as to materiality is therefore slightly off-  
14 topic.

15 The issue of materiality, however, is related to the concept of harmless error. The court  
16 recognizes that remand is not necessary if the ALJ’s error was harmless. But “a reviewing court  
17 cannot consider [an] error harmless unless it can confidently conclude that no reasonable ALJ,  
18 when fully crediting the testimony, could have reached a different disability determination.”  
19 *Stout v. Comm’, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9<sup>th</sup> Cir. 2006).


20 Bera’s statement, as the court noted above, is an opinion provided by a treating  
21 physician. Ordinarily the opinion of a treating physician is given controlling weight. *See*  
22 *Smolen v. Chater*, 80 F.3d 1273, 1285 (9<sup>th</sup> Cir. 1996). On page 3, which the ALJ did not see,  
23 Bera stated that Pope has significant limitations with reaching, handling, or fingering. (Doc 17-  
24 1, p. 3) He stated that Pope could use her hands/fingers/arms effectively only 10% of the time.  
25 *Id.* This limitation, if accepted by an ALJ, could preclude Pope from performing the jobs  
26 identified by the vocational expert. They all seem to involve a considerable amount of hand  
27 work as do many sedentary jobs. *See Steiner-Leach v. Berryhill*, 2017 WL 969330, at \*7 (D.  
28 Idaho 2017) (“[S]edentary work . . . often requires good use of both hands.”). Accordingly,

1 the court cannot conclude that “no reasonable ALJ, when fully crediting the testimony, could  
2 have reached a different disability determination.” *See Stout v. Comm'r, Soc. Sec. Admin.*, 454  
3 F.3d 1050, 1056 (9<sup>th</sup> Cir. 2006). The court finds that the ALJ’s failure to supplement the record  
4 was not harmless.

5  
6 IT IS ORDERED that the final decision of the Commissioner is reversed. The case is  
7 remanded for further administrative proceedings.

8 The Clerk of the Court is directed to prepare a judgment and close this case.

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10 DATED this 2<sup>nd</sup> day of May, 2018.

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14 Leslie A. Bowman  
15 United States Magistrate Judge  
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